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ABSTRACT

This article, written by two lawyers, defines defamation, discusses the basic law of defamation and stigma, and focuses on recent case law on this topic. The cases are only a sample of the numerous cases that school districts across the nation face on the issues of defamation and stigma. The following topics are included in the legal review: the requirement of falsity, opinion as a defense to an action in defamation, publication communicated to a third party, teachers as public officials, defense as privilege, what constitutes a stigmatizing charge, deprivation of a liberty interest, employee pleading the falsity of charges, the necessity of publication, and due process. (JAM)

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DEFAMATION & STIGMA CLAIMS AGAINST PUBLIC EMPLOYERS

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INTRODUCTION

In May of 1987 a headline in the National Law Journal read: Employers Face Upsurge in Suits Over Defamation. The article went on to state:

> Employers across the country are facing a new kind of potential liability with every employee they hire; a defamation action if the relationship doesn't work out.[1].

This area of law is growing and school district employers are certainly not immune from such actions taken against them. Defamation actions are now being brought by disgruntled employees who at one time had confined their actions to wrongful discharge suits. Currently, such defamation actions involve in part, former employees who allege that references being given to prospective employers are defamatory and are preventing them from getting job offers. In other cases, employees accused by their bosses of everything from theft and dishonesty to sexual abuse and incompetence are filing defamation suits- some even while they are on the job. Such disgruntled employees are also filing Section 1983 Civil Rights stigma actions against their employers claiming that as a result of the actions of their employers they have been denied a range of employment opportunities. School districts are further exposed to such actions brought by citizens in their districts who claim to have been defamed by school district employees. These lawsuits threaten the security of all school districts and an understanding of the basic issues associated with these actions is necessary for all school attorneys.

This article will briefly discuss the basic law of defamation and stigma and will focus on setting forth recent case law on this topic.

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1. The National Law Journal May 4, 1987 p. 1 and 30.

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

A. DEFAMATION AND THE PUBLIC SCHOOLS

Defamation is a matter of state law; there is no uniform, federal law of defamation. Therefore, discussion of this topic will focus on a broad overview of the law of defamation as generally observed by most states. Occasional reference will be made to specific state law where appropriate for purposes of discussion. The focus of this article, however, will be on recent case law.

Generally, defamation is a derogatory statement concerning a particular individual that, to some extent, harms that individual's reputation or good name. A defamatory statement is either spoken, written, or, in some cases, broadcasted to a third party -- a person or persons other than the individual who is the subject of the statement. A spoken defamatory statement is generally referred to as slander, while a written defamatory statement is referred to as libel. Libel also may include spoken defamatory statements that are broadcast over radio or television because of the vast audiences involved. Such statements may cast aspersions upon a person's honesty, integrity, virtue, sanity or other qualities of the person's character.[2]

Whether a statement is defamatory is generally determined by the court. If the court determines there is a reasonable basis for drawing a defamatory conclusion from the statement, taken as a whole, then the jury will determine whether in fact the statement was understood in such a manner by the average person. In determining whether such a defamatory conclusion may be drawn from a particular statement, the court "must accord the words their natural meaning and ... cannot strain to interpret them in their mildest and most inoffensive sense in order to render them nondefamatory." [3].

In Matherson v. Marchello,[4] the New York State Appellate Division held that certain statements made over the radio during the interview of a rock and roll band called "The Good Rats" were susceptible of a defamatory connotation and were thus actionable. The objectionable statements were made in

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[2]. See generally, Law of Torts, William L. Prosser, section 106 (3rd ed. 1964)

[3] Matherson v. Marchello, 100 A.D.2d 233, 240, 473 N.Y.S. 2d 998 (N.Y. App. Div. 2d Dept. 1984)

[4] 100 AD2d 233; 473 N.Y.S. 2d 998 (N.Y. App. Div. 2d Dept. 1984)

reference to Mr. and Mrs. Matherson, plaintiffs in this case, who were affiliated with a commerical establishment from which the Good Rats had been banned. The statements were as follows: "We used to fool around with his wife" and "I don't think it was his wife that he got upset about. I think it was when somebody started messing around with his boyfriend that he really freaked out."[5] The court found that the first statement could have been interpreted by listeners to mean that the plaintiff wife in that case was having an affair with one of the "Good Rats," and was therefore clearly libelous.

In regard to the second statement, however, the court found that an imputation of homosexuality was less clearly libelous in light of "the fact that an increasing number of homosexuals are publicly expressing satisfaction and even pride in their status." [6]. However, the court ultimately held that an imputation of homosexuality was defamatory because in our current society, many people still view homosexuality as immoral.

The Requirement of Falsity

An essential element of defamation is that the defamatory statement must be a false statement. If the statement is true, it is considered to be an absolute defense to a claim of defamation.[7] The constitutional guarantee of freedom of speech and of the press protects an individual's right to speak or write the truth. However, constitutional protections do not cover false, unprivileged and defamatory statements, which may expose a person to unwarranted hatred, ridicule, disgrace or the like. Even though a person may publish a defamatory statement, that person is not subject to liability for defamation if the statement is true.[8] Generally, the truth or falsity of the defamatory statement

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[5] 100 AD 2d at 234; 473 N.Y.S.2d at 1000

[6] 100 AD2d at 242; 473 N.Y.S. 2d at 1005

[7] See Rinaldi v. Holt Rinehart and Winston, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299; (1977); cert. den. 434 U.S. 969

[8] See Restatement of the Law Second.Torts 2d, Vol.3,sec. 581A

is a question for the jury to decide.[9]

Opinion as a Defense to An Action in Defamation

The Constitution also provides protection of statements that are opinion as opposed to statements of fact. Statements of fact that are false are subject to actions in defamation whereas statements of opinion are not. In order to establish an action in defamation, there must be a false, defamatory, factual statement on the part of the defendant. Even when language seems to directly implicate a person's morals, honesty, or character, such language may be protected by the First Amendment if it is considered to be a statement of opinion rather than a statement of fact. Whether a statement is one of fact or opinion is a question of law for the court to determine.[10]

Courts have found speech to be constitutionally protected even where it insinuates that a person has questionable morals in his or her occupation. Recently in Deupree v. Iliff,[11] the United States Court of Appeals for the Eighth Circuit held that a statement made by an attorney on a radio call-in program about a sex education teacher was opinion rather than fact and thus was not actionable. The statement identified Deupree as "a teacher who derives personal sexual gratification from teaching her family relations course . . ."[12] Specifically, the comment stated "that Deupree was much more interested in the titillating sorts of information that [she] actually derives probably a very secret sort of sexual gratification'"[13] While Deupree involved a suit in defamation brought by a public school teacher against a party not otherwise involved in the public school setting, this case demonstrates how a potentially damaging statement can be considered opinion and thus be constitutionally protected and immune from suit.

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[9] Restatement of the Law Second, Torts 2d, Vol.3,sec. 617(b)

[10] Deupree v. Iliff, 860 F.2d 300, 303 (8th Cir. 1988); citing Janklow v. Newsweek, Inc., 788 F2d 1300, 1305 n.7 (8th Cir) (en banc); cert. den. 479 U.S. 883 (1986)

[11] Dupree v. Iliff, 860 F.2d 300 (8th Cir. 1988).

[12] Id. at 303.

[13] Id.

In analyzing this case, the Eighth Circuit applied the four factors set forth in the opinion of the Court of Appeals for the District of Columbia in Ollman v. Evans,[14] which both state and federal courts generally use in differentiating between fact and opinion. These factors are:

(1) the precision and specificity of the disputed statement;
(2) the plausible verifiability of the statement;
(3) the literary context in which the statement was made; and
(4) the public context in which the statement was made.[15]

The Court concluded that reasonable listeners following the call-in radio show would recognize that the show was geared to attract a wide range of diverse views and would understand the statement about the teacher, under the circumstances, was a statement of opinion on the appropriateness of a specific sex education class in a local public school.

The Court went on to explain that because "the statement was an expression of opinion rather than an assertion of fact, [the speaker was] '[a]bsolutely protected under the [first [a]mendment' against a defamation action based on that statement."[16] The Court further explained that this premise was based on the principle that an opinion cannot be false and thus cannot support a defamation action which requires a false statement.[17] Thus, the teacher's defamation claims in libel and slander failed.

Another recent case holding that certain statements were of opinion rather than of fact and thus not actionable was Cromley v. Bd. of Ed. of Lockport Township High School District 205.[18] In this case a reading department chairperson, Marcello Cromley, sued a reading teacher, Donald Meints, and the school district for comments made by Meints against Cromley. In this case, certain complaints of sexual harassment had been reported to Cromley by female students in

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[14] 750 F.2d 970 (D.C. Cir. 1984), cert. den. 471 U.S. 1127

[15] Deupree, 860 F.2d at 303, quoting Janklow v. Newsweek Inc., 788 F2d 1300, 1302-03

[16] Id. at 304, quoting Janklow, 788 F.2d at 1302.

[17] Id., citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)

[18] _F. Supp. __, (No. 87-C-9767) (N.D. Ill., Nov. 3, 1988)

Meints' reading class, and Cromley had attempted to report the information through the proper channels. When Meints caught wind of this, he wrote a rebuttal claiming that Cromley's evaluation was a:

> "malicious, vindictive, vengeful attempt to discredit me both as a person and as an educator," that it was "rife with innuendos, insinuations, fabrications, and half-truths," and that "Cromley's remarks which, based on hearsay, were taken out of context, contorted, and made 'dirty' by a mind which is consumed with and obsessed with finding all references to women as sexually motivated" . . . The rebuttal also stated that "perhaps I should sympathize with a person who looks at everything in such a jaded, contorted, twisted manner." Meints also told other teachers that Cromley had made an anonymous telephone call reporting him to the DCFS [Illinois Department of Children and Family Services].[19] (citations ommitted).

In determining whether Meints' statements about Cromley were defamatory, the Court first noted that under Illinois law there was no substantive difference recognized between the causes of action of libel and slander.[20] Therefore there would be no less of a burden of proving libel than there would be in proving a traditional slander cause of action. The Court went on to state the standard of proof that must be met was whether the words were "'so obviously and naturally hurtful to the person aggrieved that proof of their injurious character can be dispensed with.'" [21]

Cromley alleged that Meints' words were libelous per se

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19. Id., Slip op. at 2

20. The traditional demarcation between libel and slander is based upon whether the words are written or spoken. Unlike the law of slander, in the law of libel, the existence of damage is conclusively presumed from the publication itself and a plaintiff may rely on general damages. See Matherson v.Marchello, 100 A.D.2d 233, 237-239; 473 N.Y.S. 2d 998 (N.Y. App. Div., 2d Dept. 1984)

21 Cromley,slip op. at 7, quoting Quilici v. Second Amendment Foundation, 769 F2d 414, 417-18 (7th Cir. 1985), cert. den. 475 U.S. 1013 (1986)

under Illinois law both because they imputed an inability to perform or a want of integrity in the discharge of Cromley's duties, and because they prejudiced her in her profession or trade.[22] The Court analyzed Meints' comments and quoted Ollman v. Evans[23] in finding the statements were opinion and thus were constitutionally protected. The Court stated that the statements were not "capable of objective verification" [and that] the average person would not infer that they had a "factual context" -- and the broader context of the whole rebuttal "signals that the statement is opinion."[24]

The Court did however note that one comment made by Meints came "much closer to crossing the line" as being libelous.[25] The comment referred to by the court was the statement by Meints which insinuated that Cromley had a dirty mind "'which is consumed with and obsessed with finding all references to women as sexually motivated.'" The Court, however, held that "taken in context of [Meints'] whole rebuttal [to Cromley's report of sexual harassment] these comments are mere opinion and thus not actionable."[26]

The Court recognized that it could with a bit of imagination, contemplate situations in which Cromley's 'dirty' mind might create an inability to perform her work well as a department head. Her ability to fairly evaluate male teachers might, for example, be called into question.[27] However, the Court would not lessen the strict standard for finding words libelous and nevertheless granted the defendant's motion to dismiss the complaint.

The New York State Court of Appeals, New York's highest state court, has also held that expressions of opinion are constitutionally protected -- even where the statements of opinion are meant to insult and even punish a particular

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[22] Id.

[23] 750 F.2d 970 (D.C.Cir. 1979); cert. den. 471 U.S. 1127 (1985)

[24] Cromley, slip op. at 8, quoting Ollman v. Evans, 750 F2d 970, 979 (D.C. Circ. 1979), cert. den. 471 U.S. 1127 (1985); See also Stevens v. Tillman, 661 F. Supp 702. 708 (N.D. Ill. 1986).

[25] Cromley, slip Op. at 9

[26] Id.

[27] Id.

individual.[28] In Steinhilber v. Alphonse, a member of a union continued to work after the union declared a strike against the employer, New York Telephone Company. The defendant union was not kind in dealing with the plaintiff who worked for several days in violation of the strike order and union rules until she resigned from the union. In fact, the plaintiff was the subject of two very insulting statements attributable to the union; one being a banner displayed during picketing activity, and the other being a tape-recorded telephone message to anyone dialing the private union telephone number.

The words on the banner displayed proudly by union members for all to see were: "#1 SCAB LOUISE STEINHILBER SUCKS."[29] As one can well imagine, Louise was not exceptionally happy about being characterized in such a manner. To add insult to injury, the vice-president tape-recorded a telephone message as follows:

> Wednesday, April 25th. It is with amazement I report to you, the good membership of this union that Louise the scab Steinhilber has been named secretary of the week by a local radio station. Even further beyond comprehension is the fact that a union member, Barbara Van Etten, is the one who called the radio station to suggest Louise the scab to be considered for what should be an honorable position. In Barbara's case, brains aren't everything. In fact, in her case they are nothing. She has a soft heart and a head to match. Louise the scab, years ago, she was an unknown failure. Now she is a known failure. She lacks only three things to get ahead, talent, ambition, and initiative. But she has friends. In fact, if you have her for a friend, you don't need any enemies. In times of trouble, she is waiting to catch you bent over at the right angle. At least, she looks like a million, every year of it. Her boyfriend drinks ten cups of coffee a day to steady his nerves, just so he can look at her face. When she comes into a room, the

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[28] Steinhilber v. Alphonse, 68 NY2d 283; 508 N.Y.S.2d 901; 501 N.E.2d 550 (N.Y. 1986).

[29] 68 NY2d at 288; 508 NYS 2d at 902; 501 NE 2d at 551

> mice jump up on chairs. But she could be a perfect model, for a shipbuilder. If she ever gets into an elevator, if she could fit in it, it better be going down. And in case I haven't made my point, 1986 is closing in upon all of us. Let's choose our friends by their deeds. Only in solidarity can we expect to be successful. For the Communication Workers of American, Local 1120, this is Rick Martini."[30]

Opinion or not, Louise Steinhilber was not too pleased about hearing the above statements and sued the union for defamation. But the New York Court of Appeals held that the statements were expressions of pure opinion and that, under Gertz v. Robert Welch, Inc.,[31] were entitled to the absolute protection of the First Amendment. In Gertz, the U.S. Supreme Court had stated: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." [32]

The Court went on to discuss the difference between "pure opinion," which is not actionable, and "mixed opinion" which is actionable. A pure opinion is either a statement of opinion accompanied by its supporting facts, or one not accompanied by such facts but which does not imply that it is based upon undisclosed facts. If the statement of opinion implies that it is based on undisclosed fact, it is a mixed opinion.[33] The Court then analyzed the statements by applying the four factors of Ollman v. Evans,[34] as discussed above, and held that although the statements were "a tasteless effort to lampoon plaintiff for her activities as a 'scab', they were merely statements of opinion and were thus

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[30] Id.

[31] 418 U.S. 323 (1974)

[32] Steinhilber, 68 NY2d at 289; 508 N.Y.S.2d at 903; 501 N.E.2d at 552, quoting Gertz v. Robert Welsch, Inc., 418 U.S. 323, 339-340(1974)

[33] 68 NY2d at 289

[34] 750 F.2d 970 (D.C.Cir.1984); cert. den. 471 U.S. 1127

not actionable."[35]

Although the constitutional right to express one's opinion appears to be quite liberal, if an opinion is a "mixed opinion" as described by the Court in Steinhilber and such an opinion implies that it is based upon undisclosed defamatory facts, it may indeed be actionable. This premise was also noted in Cromley,[36] and is illustrated in two recent state cases, one from New York and one from Maine and another case from the Second Circuit. Although other issues were also addressed in these cases, the courts found that the plaintiff may have been defamed because the facts implied in True v. Ladner,[37], and in Davis v. Ross,[38] and expressed in O'Neil v. Peekskill Faculty Assn.,[39] as the bases for the respective opinions stated were false.

In O'Neil, a statement made by an attorney who was representing a school district in contract negotiations were characterized by the teachers' association as a "reprehensible racial slur" and as an expression of "bigotry."[40] The attorney brought a defamation action. The New York State Appellate Division noted that although the characterization by the union was a matter of opinion and that the facts suggesting the opinion were stated, "virtually all of the supporting facts stated were false."[41] Specifically, the plaintiff attorney was misquoted as having made the following statement to the district's faculty association president, who was black, as he entered the room to talk to plaintiff: "I have heard of tokenism before but this is the first time I have seen it in negotiations." The plaintiff in fact stated "Are you the token?" while gesturing to the other members of the negotiating team who remained outside of the room. It was noted that the board president himself stated that he was not convinced that the attorney's remarks were racially motivated. Therefore, the Court

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[35] Steinhilber, 68 NY2d at 295; 508 N.Y.S.2d at 907; 501 N.E.2d at 556

[36] Cromley, slip. op. at 8

[37] 513 A2d 257 (Me. 1986)

[38] 754 F2d 80 (2nd Cir., 1985)

[39] 120 A.D.2d 36, 507 N.Y.S.2d 173 (N.Y. App. Div., 2nd Dept. 1986)

[40] O'Neil, 120 A.D.2d at 46; 507 N.Y.S.2d at 178

[41] Id.

concluded that summary judgment on behalf of the union based on the opinion defense was precluded.

While a person may be held liable for an expression of opinion accompanied by false facts upon which the opinion is based, liability can also be found when such facts are merely implied. The Second Circuit has stated that liability may be imposed "when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader."[42] In Davis v. Ross, Dianna Ross, the entertainer-employer, wrote a letter listing seven people who were no longer employed by her, including Davis, who had resigned the year before. The letter went on to say the following:

> If I let an employee go, it's because either their work or their personal habits are not acceptable to me. I do not recommend these people. In fact, if you hear from these people, and they use my name as a reference, I wish to be contacted.[43]

The district court had found that the letter should be construed as a mere expression of opinion. On appeal, however, the United States Court of Appeals for the Second Circuit reversed this decision. The Court held that even if the first part of the letter merely expressed an opinion, the subsequent statement, "I do not recommend these people" was not merely opinion because it implied that others would also find this individual's work or personal habits unacceptable. In addition, the Court held that even if the statements contained in the letter were considered to be opinion, they still could form the basis of liability, since the letter, when read in its entirety, seems to imply that the employer had knowledge supporting her claim of the employee's unacceptable work and personal habits. The Court also emphasized that the employer knew at the time she wrote the letter that the employee had not been fired but had voluntarily resigned. Based on all this, the Court held that the letter in question was susceptible of several interpretations, one of which could be libelous.

Another case that found liability based on an expressed opinion which implied undisclosed false facts was True v.

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[42] Hotchner v. Castillo-Puche, 551 F 2d 910, 913 (2nd Cir. 1977); Davis v. Ross, 754 F.2d 80, 86 (2nd Cir., 1985).

[43] Davis v. Ross 754 F.2d at 85

Ladner.[44] In True v. Ladner, the Maine Supreme Judicial Court rejected the defendant's, school superintendent Ladner's argument that statements made by the superintendent were absolutely privileged because they were expressions of opinion and not of fact. These statements were made to the superintendent of another Maine school district who had requested Ladner's opinion of True, a former teacher in Ladner's district who had recently applied for a position in the other school district. As a result of Ladner's expressed opinion, the other district rejected True as a candidate and instead hired a candidate suggested by superintendent Ladner.

The Maine court refused to reverse a jury verdict for the teacher stating:

> Here the statements by Ladner, although arguably in the form of opinions, imply undisclosed defamatory facts. For example, the statement that True is not a good mathematics teacher implies that Ladner had personally evaluated True's teaching and found it wanting or that evaluations made by others were unfavorable and Ladner had received those unfavorable evaluations. The statement that True was 'more concerned with living up to the terms of his contract rather than going the extra mile' implies a lack of involvement in extracurricular activities, a failure to give assistance to students outside the classroom, and a failure to assume other responsibilities not mandated by the contract. . . . Thus the jury could properly find Ladner's statements were statements of fact. This finding is supported by the evidence and will not be disputed on appeal.[45]

The implied facts were found to be false in light of True's actual record as a teacher which appeared to be quite commendable. The Court upheld the jury verdict against Superintendent Ladner finding that he had not been performing a "function or duty" within the meaning of the State of Maine's tort statute and was therefore not immune from suit.[46]

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[44] 513 A2d 257 (Me. 1986)

[45] True v. Ladner, 513 A.2d at 262

[46] Id. at 260

Publication

Even if it is established that a defamatory statement has been made, if the statement has not been communicated to a third party, an action in defamation will not be upheld. In order to establish an action in defamation, a person must show that such communication - or publication - of the defamatory language has occurred. Publication may not be found if the person to whom the defamatory statement is relayed is not considered to actually be a third party because he was authorized by state statute to review such statements.[47]

In Noel v. Andrus, a probationary teacher claimed that he was defamed under Louisiana state law when a school board employee told the school superintendent that the teacher had asked the employee's son to lie for him.[48] Noel was dismissed after having doubled-up on his driver education classes and after having taken an unauthorized vacation to New Orleans. He was also accused of taking the driver education car as his transportation, and of requesting that some of his students lie to protect him. The Court of Appeals for the Fifth Circuit recognized that the Louisiana statute provided for the dismissal of a probationary teacher by the school board upon the written recommendation of the school superintendent, including factual detail that could be provided to support such recommendation. Therefore, the Court held that communication of the allegedly false information to the superintendent did not meet the publication requirements necessary to establish a defamation claim because the receipt of that information by the superintendent was statutorily authorized.[49]

While state statutory requirements such as those discussed above may offer school districts some protection from claims of publication of defamatory information, in some states, publication may be found even where an employer relates the reasons for an employee's dismissal to no one but the employee. The Minnesota Supreme Court held in Lewis v. Equitabel Life Assurance Society of the United States[50], that the publication requirement for defamation may be satisfied

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[47] Noel v. Andrus, 810 F.2d 1388 (5th Cir. 1987)

[48] Id. at 1393.

[49] Id.

[50] Lewis v. Equitable Life Assurance Society of the United States, 389 N.W. 2d 876 (S.C. Minn. 1986).

where a dismissed private employee was foreseeably compelled to communicate the reasons for his dismissal to a prospective employer.

In Lewis, a number of private employees were discharged for "gross insubordination" and claimed that in order to be truthful to prospective employers regarding their reasons for leaving their jobs, they were forced to repeat, or publish, a defamatory statement.

The Court acknowledged that recognition of the doctrine of compelled self-publication could significantly broaden the scope of liability for defamation if it were not properly applied.[51] However, the Court went on to explain that:

> The concept of compelled self-publication does no more than hold the originator of the defamatory statement liable for damages caused by the statement where the originator knows, or should know, of circumstances whereby the defamed person has no reasonable means of avoiding publication of the statement or avoiding the resulting damages; in other words, in cases where the defamed person was compelled to publish the statement.[52]

Thus, not only must the defamed employee be compelled to publish the false defamatory statement, but it must also have been foreseeable to the employer that the compelled self-publication would occur. But in most such situations the foreseeability factor would be easily proven since prospective employers commonly inquire as to a candidate's reasons for leaving his previous job. Whether Lewis is to be followed by other state courts as a general rule remains to be seen. At the present time a growing number of states have had occassion to adopt the self-publication doctrine and it is currently the law in a growing minority of American jurisdictions.[53] It is clear that in light of Lewis, that a

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[51] Id. at 888

[52] Id.

[53] Mandelblatt v. Perelman, 683 F.Supp. 379, 386 (S.D.N.Y. 1988). The Court in Mandelblatt did not adopt the self publication doctrine, holding that the facts of the case did not require the Court to do so. Other state courts which have adopted the doctrine of self publication are: Churchey v. Adolph Coors Company 759 P.2d 1336 (Colo. 1988); McKinney v. County of Santa Clara, 110 Cal. App.3rd 787; 168 Cal.

school board or superintendent must be cautious when advancing reasons to a school district employee for his discharge.

Teachers as Public Officials

The United States Supreme Court has held that, under the First Amendment, criticism of a public official relating to his public conduct is actionable only upon a showing of malice, which is defined to be either knowledge that the statement is false, or a reckless disregard as to whether or not it was false.[54] The Supreme Court subsequently extended this rule to litigation involving public figures in Gertz v. Robert Welch, Inc.[55] Gertz also held that the individual states were responsible for determining the degree of fault private persons must prove in order to succeed in a defamation action.

The U.S. Supreme Court has not yet ruled on whether teachers are considered public officials for purposes of defamation suits, so the states have been left to make this determination. In Rosenblatt v. Baer[56], the Supreme Court

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Rptr. 89, 93-94 (1st Dist. 1980); First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696. 701-02 (Tex.Civ.App.1980); Grist v. Upjohn Co., 16 Mich.App. 452, 168 N.W.2d 389, 406 (1969) Colonial Stores v. Barrett, 73 Ga.App. 839, 38 S.E.2d 306, 308 (1946)

[54] New York Times Co. v. Sullivan Newspapers, 376 U.S. 254 (1964).

[55] 418 U.S. 323 (1974) A person may be deemed to be a public figure on one of two grounds:

> 1. where he has achieved such fame or notoriety that he beomes a public figure for all purposes (e.g. a celebrity); or
> 2. where he voluntarily enters or is drawn into a public controversy (e.g. a candidate for office). The individual becomes a public figure for purposes of the range of issues raised by that controversy.

Id. at 345-352.

[56] 383 U.S. 75 (1966)

indicated that there were two standards for determining public official status. Public official status applies:

> (1) to those "who have, or appear to have substantial responsibility for or control over the conduct of governmental affairs," and (2) where there is "independent interest in the qualifications and performance of the person ... beyond the general public interest in the qualifications and performance of all government employees.[57]

Recently, the Supreme Court refused to hear a case involving the status of a public school teacher. In Richmond Newspapers, Inc. v Lipscomb [58], the Virginia Supreme Court had ruled that a high school English teacher was not a public official because there had been no showing that she "influenced or even appeared to influence or control any public affairs or school policy" and also because "the public had no independent interest in [the teacher's] qualifications and performance 'beyond its general interest in the qualifications and performance of all government employees.'"[59]

The teacher's defamation claim in Richmond grew out of a front-page article printed in the local newspaper which was based essentially on negative comments about the teacher's teaching ability and qualifications despite the fact that a number of students, teachers and school administrators were available to contradict those complaints at trial. Based on her status as a private citizen, the Virginia Supreme Court upheld a $500,000 award for compensatory damages against the newspaper caused by the negligent reporting of the defamatory article. However, the Court reversed an award of punitive damages, holding that such damages could only be awarded where the plaintiff met the New York Times standard of proving malice by clear and convincing evidence, which was not met in this case.[60]

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[57] 383 U.S. pp. 85-86

[58] Richmond Newspapers, Inc. v. Lipscomb, 362 S.E. 2d 32 (1987), cert. den. 108 S. Ct. 1997 (1988).

[59] Id. at 37, quoting Rosenblatt v. Baer, 383 U.S. 75, 85-86 (1966).

[60] Id. at 38, citing Newspaper Publishing Corp. v. Burke, 224 S.E. 2d 132, 136 (1976)

The Maine Supreme Judicial Court, in True v. Ladner,[61] discussed above, also held that a teacher was not a public official and therefore did not have to meet the New York Times standard of proof. The Court indicated that the teacher did not exercise substantial administrative policies or policy-making authority and did not supervise other employees. Importantly, the Court also noted that a teacher cannot be deemed to have voluntarily placed himself in a position of greater exposure to the media, nor to have easy access to the media for purposes of responding to reported inaccuracies.

In a recent New York State case, public official status of a high school football coach was merely assumed. Mahoney v. Adirondack Publishing Co.[62] illustrates how difficult it becomes to prove a defamation case once the plaintiff is considered to be a public figure for purposes of the lawsuit. Coach Mahoney conceded during a jury trial that he was a public figure for purposes of his action in defamation brought against a local newspaper. Although an award of compensatory damages was upheld by the Appellate Division, the New York State Court of Appeals held that since Mahoney was a public figure he must prove by clear and convincing evidence that the defamatory statements were published with actual malice. The Court concluded that Mahoney had not met this burden and dismissed the complaint.

The subject newspaper article in this case was highly critical of the coach and attributed a rather crude comment to Coach Mahoney which the Court found was incorrect according to the evidence presented. The article reported that each time the quarterback came off the field after throwing an interception, either Mahoney or an assistant coach exclaimed "Come on, get your head out of your &!(!!&." Although the newspaper did not print the actual word used in the statement, the implications were clear. However, at trial several witnesses testified as to the falsity of the quotation including the quarterback who testified that the actual statement was either "Get your head up," or "Keep your head up."

The Court of Appeals held that the testimony heard combined with the evidence presented at trial (the reporter had observed Coach Mahoney from approximately thirty feet behind the bench) lead to the conclusion that the evidence supported a finding that the statement was incorrectly reported, but did not lead to the conclusion that the

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[61] 513 A2d 257(Me. 1986)

[62] 71 NY2d 31, 517 N.E. 2d 1365 (N.Y. 1987)

reporter knew the statement was false. The Court also stated that since the statement reported was quite similar to the statement actually made by Mahoney, and since no evidence was produced to lead the Court to believe otherwise, the falsity was probably "more a product of misperception than fabrication."[63] Thus, the New York State Court of Appeals held that because the reporter may have merely misinterpreted the words "Get your head up" or "Keep your head up" as sounding like "Get your head out of your &!(!!(&," the coach did not meet his burden of proving by clear and convincing evidence that the statement was maliciously reported, and the action was dismissed.

Since the states are still split on the issue of whether teachers are public figures and the Supreme Court has not yet ruled on the matter, the results of defamation suits brought by teachers against school officials or school districts are less predictable than they would be if there were a uniform standard of proof to be met. Until the Supreme Court speaks to the issue, individual state law will have to be consulted.

Defense of Privilege

Where a policy exists permitting freedom of expression, the defense of absolute or qualified privilege also exists. Absolute privilege or absolute immunity is generally restricted to judicial and legislative proceedings and to certain executive communications made during the discharge of official duties.[64]

In New York State, as in other states, statements made by elected public officials at official meetings as to matters within their competence and in the performance of their official duties are absolutely privileged.[65] The privilege is similar to that traditionally associated with

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[63] 71 NY2d at 40; 517 NE2d at 1370

[64] See generally, Prosser and Keeton on the Law of Torts, Hornbook Series, Sections 114-15 (5th ed., 1984)

[65] See Stukuls v. State of New York, 42 NY 2d 272; 397 N.Y.S.2d 740, 366 N.E.2d 829 (1977); Clark v. McGee, 49 NY 2d 613; 427 N.Y.S.2d 740, 404 N.E.2d 1283 (N.Y. 1980); Cosme v. Town of Islip, 102 A.D.2d 717; 476 N.Y.S. 857 (N.Y. App. Div. 1st Dept 1984), aff'd 63 NY 2d 908; 483 N.Y.S.2d 205, 472 N.E.2d 1033 (N.Y. 1984)

legislative and judicial proceedings, and serves to ensure that public officials will be free to speak their minds as required for the performance of their duties.[66] Because absolute privilege is sparingly extended, a public official may instead be afforded a qualified privilege which generally requires that such person has communicated the defamatory statement in a reasonable manner and for a reasonable purpose, in other words, absent malice.[67]

A recent New York State case illustrates how courts apply the doctrine of qualified privilege. In Dunajewski v. Bellmore-Merrick Central High School District[68], the Appellate Division ruled that a social worker employed by a school district had qualified immunity from civil liability for defamation to report allegations of child abuse to the school's Committee on the Handicapped. The school's Committee on the Handicapped had been involved with the student who was the victim of the alleged abuse because of past behavioral and academic problems. When the New York State Department of Social Services ultimately determined that the allegations were unfounded, the grandfather of the student who had been accused of the acts of child abuse, sued the school and the social worker for publicizing the allegedly libelous report.

The Court below found that the publication of the report to the Department of Social Services by the school social worker pursuant to statute gave the defendants absolute immunity from civil liability. But the lower court also held that because the social worker was not statutorily authorized to report to the Committee on the Handicapped, no qualified privilege had attached with respect to that report. The Appellate Division reversed this latter decision. The Appellate Division noted that:

> [such] a qualified privilege may attach to a bona fide communication upon any

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[66] In New York State the privilege has been extended to the New York City Board of Higher Education and members of a board of education (Stukuls v. State of New York, 42 NY2d 272, 277; 397 N.Y.S.2d 740, 366 N.E.2d 829 (N.Y. 1977) Lombardo v. Stoke, 18 NY 2d 394; 276 N.Y.S.2d 97, 222 N.E.2d 721 (N.Y. 1966); Supan v. Michelfeld, 97 AD 2d 755; 468 N.Y.S.2d 384 (N.Y. App. Div. 2d Dept 1983)

[67] Prosser and Keeton on the Law of Torts, Hornbook Series, Sections 114-115 (5th Ed. 1984)

[68] 138 AD2d 557, 526 NYS2d 139 (N.Y. App. Div. 2d Dept. 1988)

> subject matter in which the communicating party has an interest or in reference to which he has a duty although the information might otherwise be defamatory. . . . However, for the privilege to attach, the recipient of the communication must have a corresponding interest or duty.[69] (citations omitted)

The Court found that the defendant school district and the Committee on the Handicapped did indeed have the requisite interest or duty so that a qualified privilege did attach. Since a qualified privilege shifts the burden of proving malice to the plaintiff, and there was no proof of malice or ill will on defendants' part, the defendants were immune from civil liability for the social worker's allegedly libelous report even though the social worker's publication to the Committee on the Handicapped was not statutorily required.[70]

Another situation where a qualified privilege exists so that malice must be proven by a plaintiff in a defamation action is the labor negotiations process. In O'Neil v. Peekskill Faculty Association,[71] discussed above on page 10, statements made by an attorney representing a school district during negotiations with the local teachers union were mischaracterized by members of the union negotiating team.

Citing the United States Supreme Court case, Linn v. Plant Guard Workers,[72] the Court in O'Neil held that where parties to a labor dispute circulate false and defamatory statements during labor negotiations, a qualified privilege attaches. O'Neil,[73] The Court in O'Neil noted that the Supreme Court based its decision on federal labor policies favoring "robust debate."[74] However, the existence of a qualified privilege does not give a party to a labor negotiation "license to injure the other intentionally by

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[69] Dunajewski, 138 AD2d at 558-559; 526 NYS 2d at 141.

[70] Id.

[71] 120 A.D.2d 36; 507 N.Y.S.2d 173 (N.Y. App. Div.2d Dept. 1986)

[72] 383 US 53 (1966)

[73] O'Neil, 120 AD2d at 42; 507 NYS 2d at 178

[74] Id., citing Letter Carriers v. Austin, 418 US 264, 275 (1974)

circulating defamatory . . . material known to be false."[75] State remedies for defamatory statements made during labor disputes are only available where the statement is published with malice, i.e., knowledge of its falsity or with reckless disregard for its truth.[76] The Court held that the plaintiff attorney met his burden of proof for summary judgment purposes under the New York Times[77] standard discussed above, and that there was a triable issue of fact as to whether the statements were reported with the knowledge that those statements were false.

As was stated above in Dunajewski, absolute immunity from suit in defamation is afforded where there is a statutory duty to report allegations of child abuse. The Court of Appeals of North Carolina similarly held recently in Davis v. Durham City Schools, that absolute immunity was granted by statute to a principal who reported a student's complaints of child abuse committed by a teacher in the district to an assistant superintendent.[78] The Court also held that because the principal's report related to the conduct of the substitute teacher complained of, at minimum, without the statutory protection, the report would be protected by a qualified privilege because the report was made in good faith on the basis of student complaints. The Court therefore found no malice or ill will that would allow the plaintiff teacher to recover in this action.[79]

Absolute privilege was also afforded a group of parents in New York who submitted a petition to their board of education complaining of the conduct and performance of a tenured teacher in the school district. In Weissman v. Mogol[80] , the group of parents demanded prompt official action and listed several factual reasons for such action. The claims were found to be unsubstantiated and the teacher claimed that as a result of the false accusation he was later

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[75] O'Neil, 120 AD 2d at 42; 507 NYS 2d at 178; citing Linn, 383 US at 61.

[76] Id.

[77] New York Times Co. v. Sullivan Newspapers, 376 US 254 (1964)

[78] Davis v. Durham City Schools, 372 S.E. 2d 318 (N.C. App 1988)

[79] Id at 321.

[80] Weissman v. Mogol, 118 Misc.2d 911, 462 NYS 2d 383 (N.Y.Supreme Ct. Nassau Co. 1983)

wrongfully excessed and not rehired when new openings arose. The Court stated that a determination whether qualified or absolute privilege was warranted requires weighing, on the one hand society's need for free disclosure without fear of civil suit, and, on the other hand, an individual's right to recover for damage to his reputation . . .[and] his means of earning a livelihood. [81] The Court went on to conclude that even though a judicial or quasi-judicial procedure to which absolute privilege attaches was not involved in this case, public policy considerations required that the statements made to the board by the parents be absolutely privileged. To hold otherwise, the Court reasoned, would discourage parents from reporting alleged mistreatment of students and from bringing potential disciplinary proceedings to the attention of the board.

STIGMA AND THE PUBLIC SCHOOL EMPLOYEE

The law of stigma centers around a person's constitutional liberty interest. The United States Supreme Court has stated that this interest includes "the right of the individual to contract, to engage in any of the common occupations of life . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[82]

In Board of Regents v. Roth, the landmark case in this area, Professor David Roth had been hired by the Wisconsin State University at Oshkosh for one academic year. Near the end of his contract, Professor Roth was informed that he would not be hired for another academic year.[83] Roth instituted suit in federal district court alleging, inter alia, that his rights to due process in the non-retention process had been violated.[84]

On appeal, the Supreme Court held that Professor Roth had not been deprived of a liberty interest. In it's

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[81] 118 Misc. 2d at 914; 462 NYS 2d at 385-386

[82] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972).

[83] Id. at 566

[84] Id. 568-569

decision, the Court noted that the "meaning of 'liberty' must be broad indeed"[85] and that a liberty interest might well be implicated in a public employment termination context.[86] However, the Court did not find that Professor Roth's non-retention was such a case. The Court found that the state had made no charge against Roth that might seriously damage his standing or associations in the community.[87] Nor did it inflict a stigma or other disability on Roth that would foreclose future job opportunities. As a result, the Court implied that a dismissal does not implicate due process liberty interests unless the reasons for dismissal are serious enough to damage the employee's reputation in his community or in his job search, or there is an attempt to restrict the employee's future job possibilities.

In cases since Roth, our federal courts have clearly stated that in order to state a claim for deprivation of a liberty interest, the employee must allege that a false and stigmatizing charge was made public by his government employer in the course of his termination.[88] Such a showing entitles the employee to a hearing where he is given the opportunity to refute the charges.

Thus, the concept of stigma recognizes two basic interests of the public employee: (1) protection of one's reputation, honor and integrity, and (2) freedom to take advantage of employment opportunities.[89] Simply stated, in other words, an action based in stigma is a civil rights action in defamation brought under section 1983 of the United States Code.

As outlined above, in order to state a claim for the deprivation of a liberty interest, an employee must allege that a false and stigmatizing charge was made public by his governmental employer in the course of the termination of his

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[85] Id. at 572

[86] Id. at 573

[87] Id.

[88] See e.g. Paul v. Davis, 424 U.S. 693 (1976); Goetz v. Windsor Central School District 698 F.2d 606 (2d Cir. 1983); Baden v. Koch 799 F.2d 825 (2nd Cir. 1986).

[89] Roth 408 U.S. at 593

services.[90] Such a showing would entitle the employee to a hearing where he would have the opportunity to refute the charges.[91] In the absence of a property right, the employee is not entitled to compulsory reinstatement regardless of the outcome of the hearing. Thus the employee cannot collect damages for a wrongful dismissal. However, the employee may be entitled to damages for a wrongfully withheld hearing.

What Constitutes a Stigmatizing Charge

A stigmatizing charge is one which implicates an employee's good name, reputation, honor or integrity. Generally, stigmatizing charges involve accusation of moral turpitude such as dishonesty or immorality, or character deficiencies that will significantly foreclose future employment opportunities. Examples include the following:

a. dishonesty[92]
b. mental illness[93]
c. drunkenness[94]
d. racial prejudice[95]
e. sexual crimes or perversions[96]

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[90] Codd v. Velger, 429 U.S. 424 (1977); Gentile v. Wallen, 562 F2d 193 (2d Cir. 1977)

[91] Goetz v. Windsor Central School District, 698 F.2d 606 (2d Cir. 1983).

[92] McNeill v. Butz, 480 F. 2d 314 (4th Cir., 1973); Goetz v. Windsor Central School District, (2nd Cir., 1983).

[93] Lombard v. Board of Education, 502 F. 2d 631 (2nd Cir., 1974).

[94] State of Wisconsin v. Constantineau, 400 US 433 (1971); Dennis v. S&S Consolidated 'Rural H. S. District 577 F.2d 338 (5th Cir., 1978)

[95] Wellner v. Minnesota State Junior College, 487 F.2d 153 (8th Cir., 1973)

[96] Austin v. Board of Education, 562 F.2d 446 (7th Cir., 1977)

f. immorality[97]
g. physical abuse of students[98]
h. disclosure of confidential information[99]
i. drug use[100]

Courts have generally held that charges relating to employee performance on the job do not trigger the right to a stigma hearing[101] As the Second Circuit noted in Russell v. Hodges, stigmatizing charges involve something "considerably graver than a charge of failure to perform a particular job within the employee's power to correct."[102] While any dismissal may injure the reputation of an employee and make it more difficult to find future employment, it does not necessarily trigger a right to a hearing in every case.

Examples of the kinds of charges which have been held not to require a hearing include the following:

a. uncooperative attitude[103]

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[97] Vanelli v. Reynolds School District No.7, 667 F.2d 773, 2 Ed Law Rptr. 366 (9th Cir., 1982)

[98] Kendall v. Board of Education of Memphis City, 627 F2d 1 (7th Cir., 1980)

[99] Brathwaite v. Manhattan Children's Psychiatric Center, 70 A.D.2d 810; 417 N.Y.S.2d 485 (N.Y. App. Div. 1st Dept. 1979)

[100] Reeves v. Golar, 45 A.D.2d 163, 357 N.Y.S.2d 86 (N.Y. App. Div. 1st Dept. 1974)

[101] Russell v. Hodges, 470 F.2d 212 (2nd Cir. (1974)); Schwartz v. Thompson, 497 F.2d 430 (2nd Cir. (1974)); Paige v. Harris, 584 F.2d 178 (7th Cir. (1978)); Loehr v. Venture County Community College, 743 F.2d 1310 (9th Cir. (1984))

[102] Russell v. Hodges, 470 F.2d at 217

[103] LaBorde v. Franklin Parish School Board, 510 F.2d 590 (5th Cir., 1975); Jeffries v. Turkey Run Consolidated School District, 492 F.2d 2 (7th Cir. (1974)); Raposa v. Meade School District 46-1, 790 F.2d 1349 (8th Cir. 1986)(upholding as not stigmatizing - complaints about a teacher's uncooperative attitude followed by the transfer of such teacher)

b. insubordination[104]
c. failure to coordinate teaching with another teacher[105]
d. use of language unbecoming a teacher[106]
e. use of harsh discipline[107]
f. improper or substandard job performance[108]
g. bad judgment[109]
h. failure of maintain an atmosphere of discipline[110]
i. poor interpersonal relationships with staff members and students[111]
j. inaccessibility to parents and failure to communicate with them concerning their children's progress in school[112]

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[104] Lutwin v. Alleyne, 86 A.D.2d 670, 446 N.Y.S. 2d 389 (N.Y. App. Div. 2d Dept 1982), mod. 58 N.Y.2d 889; 460 N.Y.S.2d 498, 447 N.E.2d 46 (1983); Gray v. Union County Intermediate Education Dist., 520 F.2d 803 (9th Cir.1975).

[105] Shirck v. Thomas, 486 F. 2d 691 (7th Cir., 1973)

[106] Weathers v. West Yuma County School District RJ1, 387 F 2d 552, aff'd 530 F.2d 1335 (10th Cir., 1976)

[107] LaBorde v. Franklin Parish School Board, 510 F2d 590 (5th Cir., 1975)

[108] Mazaleski v. Truesdell, 562 F. 2d 709, 709-715 (D.C. Cir. 1977); Lutwin v. Alleyne, 86 A.D.2d 670, 446 N.Y.S. 2d 389 (N.Y. App. Div. 2d Dept 1982); mod. 58 N.Y.2d 889; 460 N.Y. Supp. 2d 498, 447 N.E.2d 46 (N.Y. 1983); Paige v. Harris, 584 F. 2d 178 (7th Cir. 1978); Raposa v. Meade, 790 F 2d 1349 (8th Cir., 1986)

[109] Petix v. Connelie, 47 NY 2d 457, 418 N.Y.S.2d 385, 391 N.E.2d 1360 (N.Y. 1979)

[110] Matter of McNeill, 16 Ed Dept Rep 163, (Ed Commr's Decis. 1976); Smith v. Board of Education of Urbana School District No. 116, 708 F 2d 258 (7th Cir., 1983)

[111] Appeal of Martin, 25 Ed Dept. Rep 21 (Ed. Commr's Decis. 1985)

[112] Glazer v. Ackerman, __F.Supp. __ (Civ. No. 81-6373) (S.D.N.Y. July 27, 1981)

Deprivation of Liberty Interest - "Stigma Plus" Analysis

i. Requirement of Termination of Employment

In Paul v. Davis,[113] the United States Supreme Court shed greater light on the issue of determining when an individual has been stigmatized. In Paul, Edward Charles Davis III had been arrested for shoplifting. His name and picture were included in a police flyer of "active shoplifters" which was distributed to merchants. Some time after the distribution of the flyer, the shoplifting charges were dismissed and Mr. Davis contended that the distribution of the flyer defamed him, deprived him of "liberty" protected by the due process clause of the Fourteenth Amendment, and violated his constitutional right to privacy. The Court, in citing Board of Regents v. Roth,[114] held that the plaintiff had not established a sufficient claim under section 1983 and the Fourteenth Amendment. The Court held that defamation had to occur in the course of the termination of employment. On this point the Court held:

> Certainly there is no suggestion in Roth to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee.[115]

From the Court's holding in Paul v. Davis, it is evident that mere defamation by a government entity does not implicate constitutional interests and that the defamation must occur in the course of termination.

In Baden v. Koch,[116] the United States Court of Appeals for the Second Circuit did not extend the protections of a due process hearing to a supervisory city employee who had been demoted. Furthermore, in Raposa v. Meade School

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[113] 424 US 693, reh'g. den. 425 US 985 (1976)

[114] 408 U.S. 564

[115] Paul v. Davis, 424 U.S.at 710

[116] 799 F.2d. 825 (2nd Cir. 1986)

District 46-1,[117] the United States Court of Appeals for the Eighth Circuit held that a teacher who is transferred to another school in the district was not deprived of a property interest in being transferred without a prior hearing. The Court in Raposa, citing Norbec v. Davenport Community School District,[118] further held that a teacher who is transferred after complaints concerning her attitude, relationships with parents of school children, and her failure to teach current events and social studies as provided by the school curriculum, did not have a liberty interest in her reputation which required notice and an opportunity to be heard before the complaints were placed in her personnel file. On this point the Court in Raposa held that:

> a statement that is basically one alleging conduct that fails to meet professional standards is a statement which does not impinge upon a liberty interest.[119](citations omitted)

As is evident from the above stated cases, it has been held that in order to demonstrate that one has been deprived of a liberty interest, the employee must not simply have been demoted or be transferred, but that he must have been terminated. Furthermore, while the employer may have publicly disclosed stigmatizing charges against an employee, the employee's right to a due process, name clearing hearing does not accrue absent an accompanying deprivation of the employee's liberty interests.

In Diehl v. Albany County School District No. 1,[120] a federal district court recently held that a school district's non-renewal of teacher's extra pay coaching position did not deprive him of his liberty interests. Upon the decision not to renew the position, the school board limited its discussion of the reasons for their decision to an executive session and to remarks made to the press that did not implicate the teacher's moral character. The Court stated that a liberty interest only exists in favor of a public employee who is defamed by a government official during the

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[117] 790 F.2d 1349 (8th Cir. 1986)

[118] 545 F.2d 63 (8th Cir. 1976), cert. denied 431 U.S. 917 (1977)

[119] Norbeck v. Davenport Community School District, 545 F.2d 63, 69 (8th Cir. 1976).

[120] 694 F. Supp. 1534 (D.Wy. 1988),

course of termination or non-renewal of employment. The Court further stated that:

> Under the "stigma plus" analysis set forth by the United States Supreme Court, injury to reputation alone does not provide a liberty interest claim. To qualify as a liberty interest, injury to reputation must be accompanied by "some more tangible interests such as employment . . . "[Paul v. Davis] A liberty interest exists in favor of a public employee who is defamed by a state official in the course of termination or non-renewal of employment. This is so even if the employee has no property right in the employment. (citation omitted)

The Court rejected the teacher's argument that the "plus" in the "stigma plus" requirement of Paul v. Davis was met by the non-renewal of the coaching contract. The Court pointed out that the teacher had retained his teaching position and two junior high coaching assignments, and was not therefore deprived of employment nor of opportunities for future employment. The Court reasoned therefore that the plaintiff could not supply the required "plus" and was not entitled to a name clearing hearing based on the non-renewal of his coaching position.

Similarily the United States Court of Appeals for the Ninth Circuit, held in Lagos v. Modesto City Schools District,[121] that a teacher had no constitutionally protected property or liberty interest in his additional assignment as a baseball coach and, therefore, that a district's failure to renew his coaching contract did not amount to loss of liberty.

The Paul v. Davis "stigma plus" test was also not satisfied where a tenured teacher was suspended with pay.[122] The Court in Hardiman v. Jefferson County Board of Education, cited Paul v. Davis and stressed that "a person's interest in reputation alone, 'apart from some more tangible interests such as employment,' is not a protected liberty interest

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[121] 843 F.2d 347, 350 (9th Cir. 1988),

[122] Hardiman v. Jefferson County Board of Education, 709 F.2d 635 (11th Cir., 1983).

within the meaning of the due process clause."[123] The Court pointed out however, that this case involved a short period of suspension and that it would not hold that a suspension with pay could "never provide the tangible loss necessary under the Paul test.[124]

Another recent District Court case held that a teacher has no liberty interest in the grades she assigns to her students. In Wassman v. Hoagland,[125] a teacher claimed that as a certified tenured public school teacher, she had a liberty interest in the exercise of her professional judgment in regard to the grades she assigned her students for their performance. The teacher further claimed that this liberty interest was deprived without due process when the school principal unilaterally changed several of the grades she had awarded.

The Court noted that since the teacher's employment had not been affected, the teacher's actual grievance apparently concerned her desire to exercise her professional judgment unencumbered by her superiors. On this point, the Court stated:

> If this Court were to extend to this plaintiff the procedural protection requested, it would open the door to every and all employees who have some "gripe" about their superiors' activities.[126]

Since there was no protectable liberty interest in a teacher's right to unaltered grades, the Court did not find the plaintiff's claim was deserving of the protection of the Due Process Clause. At the time of this writing, the United States Court of Appeals for the Second Circuit has just affirmed the decision of the District Court holding that:

> [t]he district court was correct to dismiss Wassman's complaint because she failed to allege facts that might show the infringement of a protected liberty

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[123] Id. at 638, quoting Paul v. Davis, 424 US at 701

[124] Id. at 639.

[125] Wassman v. Hoagland, __F. Supp.__ (C.A. No. 87-881E) (W.D.N.Y. July 26, 1988).

[126] Id., Slip op. at 6

interest.[127]

Several other recent decisions have denied the existence of a protectable liberty interest which is necessary to support a stigma claim.

In Yatvin v. Madison Metropolitan School District,[128] the United States Court of Appeals for the Seventh Circuit held that an employer's statements to the effect that an applicant for a promotion within a school district was denied a promotion because she lacked managerial experience were not stigmatizing. The Court in Yatvin held that the ground for the denials was not stigmatizing in the sense of being defamatory or even derogatory, did not deprive the applicant of occupational liberty and was therefore a frivolous claim. On this point the Court held:

> A routine denial of a promotion to a position for which there are competing applicants is not the stuff out of which a violation of due process is made. Otherwise every such promotion (implying denial of promotion to all but one of the applicants) could spark lawsuits by the disappointed applicants.[129]

In Maples v. Martin,[130] the United States Court of Appeals for the Eleventh Circuit ruled that the transfers of tenured university professors to other departments within the University with no loss of pay or rank cannot be analogized to terminations of employment and thus did not implicate property or liberty interests.

The United States Court of Appeals for the Sixth Circuit held in Garvie v. Jackson,[131] that the termination of a tenured professor's position as university department head where employment as tenured professor was continued with no showing of the loss of employment opportunities is not stigmatizing because there is no liberty interest in reputation alone. The professor retained his position as a

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[127] Wassman v. Hoagland, __F.2d__, (Docket No. 88-7750), slip opinion at p. 1 (2nd Cir. February 2, 1989)

[128] 840 F.2d 412, 417 (7th Cir. 1988)

[129] Id. at 417

[130] 858 F.2d 1546, 1550 (11th Cir. 1988)

[131] 845 F.2d 647, 652 (6th Cir. 1988)

tenured professor so there was no loss of employment, only a loss of status in losing his position as a department head.

In St. Louis Teachers Union v. Board of Education,[132] the United States District Court for the Eastern District of Missouri held that unsatisfactory ratings of teachers based on their students' achievement test scores were merely allegations that teachers failed to meet professional standards and did not implicate the teachers' liberty interests. Likewise a federal district court in Kansas ruled in Burk v. Unified School District No. 329,[133] that charges of improper job performance, i.e. that a principal did not get along with the faculty, was not stigmatizing unless the charges had gone to the overall incompetency of the employee in performing his job. However, the court noted that rumors of sexual misconduct, stemming from a letter written by a student to the school board which contained charges of immorality, created a question for the jury because such rumors may have implicated a liberty interest. The Court thus granted the school district's motion for a directed verdict regarding the stigma claim based on the charge of improper job performance, but denied the motion with respect to the teacher's liberty interest claim concerning the school district's handling of the student complaint.

The "plus" called for by the Supreme Court in Paul v. Davis therefore must be in addition to a loss of status or a negative statement implicating one's reputation. The person claiming that he has been stigmatized must be afforded a due process hearing but he must show that he has been damaged through loss of employment, job opportunities, or standing within the community. Furthermore, a mere negative report or statement of dissatisfaction with an employee's job performance is insufficient to entitle that employee to a due process, name-clearing hearing, whereas such hearing may be required when the employee's morality is called into question.

ii. Employee Must Plead Falsity of Charges

As with defamation, the plaintiff in a stigma action must allege the falsity of the stigmatizing charge. There can be no liberty interest implicated unless the employee denies

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[132] 652 F.Supp. 425, 432-33 (E.D. Mo. 1987)

[133] 646 F.Supp. 1557, 1565-66 (D.Kan. 1986)

the charges.[134] In Codd v. Velger, a police officer had been dismissed from the New York City Police Department because "he had put a revolver to his head in an apparent suicide attempt"[135] When a subsequent employer obtained this information from the police department, Velger was again dismissed. He then brought suit against the department, claiming that the information in his personnel file had stigmatized him. The United States Supreme Court dismissed his lawsuit on the ground that he had never denied that the incident had taken place. The Court reasoned that if the only remedy for a violation of this constitutional right is a hearing and if the purpose of the hearing is to clear the employee's name, the hearing is meaningless if the employee does not deny the charges. The Court stated that "[O]nly if the employer creates a false and defamatory impression about the employee in connection with his termination is ... a hearing required."[136]

iii. Necessity of Publication

The Supreme Court of the United States has made it clear that accusations made by a public employer during the course of terminating an employee must be made public by the employer and preclude the employee from otherwise available employment opportunities in order to constitute a deprivation of the employee's liberty interest.[137] Without publication, charges cannot affect the employee's reputation, honor, good name or integrity.

In Bishop v. Wood the Supreme Court held that because the reasons for plaintiff's dismissal were communicated to plaintiff in a private conference, they could not damage the employee's reputation or hamper his search for new employment. The Court stressed that a contrary conclusion would discourage feedback from employer to employee. The distinction between the publication requirement necessary to prove defamation, and the publication requirement necessary for stigma claims has been pointed out in some cases.[138] The

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[134] Codd v. Velger, 429 U.S. 624 (1977)

[135] 429 US at 626

[136] 429 US at 628

[137] Bishop v. Wood, 429 U.S. 341 (1976)

[138] See Lentlie v. Egan, 61 NY2d 874, 462 N.E.2d 1185 (N.Y. 1984)

New York State Court of Appeals has noted that the law of defamation requires that the defamatory statement be communicated to a single person, whereas a discharged employee's right to a name-clearing hearing is based on the public disclosure by the employer of stigmatizing charges.[139]

The publication requirement for finding that an employee has been deprived of his liberty interest is public disclosure of the stigmatizing charge; mere discussion of such charges with the employee in private is insufficient.[140]

Public disclosure was held not to have been made where a written report charging a probationary teacher with dishonesty and recommending non-renewal of his contract was submitted by the school superintendent to the school board.[141] The report was submitted to the board during a closed executive session so that the public had no access to the report or to the discussion following its submission. The Court held that deprivation of the teacher's liberty interest would not occur until after public disclosure of the adverse allegations had been made in accordance with the requirements of Bishop v. Wood.

In a recent case entitled Brandt v. Board of Cooperative Educational Services,[142] the United States Court of Appeals for the Second Circuit held that the public disclosure requirement was met "where the stigmatizing charges [were] placed in the discharged employee's personnel file and [were] likely to be disclosed [to future employers]."[143] The Court stated that if the employee was "able to show that prospective employers [were] likely to gain access to his personnel file and decide not to hire him, then the presence of the charges in his file [would have had] a damaging effect on his future job opportunities."[144] The dismissed employee could therefore demand a name clearing hearing before he had actually lost any job opportunities. As a result, the Second Circuit Court remanded the case to the district court to give the employee the opportunity to substantiate his claim that

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139 Lentlie v. Egan, 61 NY2d at 876; 462 NE 2d at 1186 (citations omitted)

140 Bishop v. Wood 429 US at 348

141 Noel v. Andrus, 810 F 2d 388 (5th Cir. 1987)

142 820 F 2d 41 (2d Cir. 1987)

143 Id. at 45

144 Id.

the BOCES was likely to make his personnel file available to prospective employers.

Subsequently, in Brandt, all references to the stigmatizing charges were deleted from the teacher's personnel file and on remand the Federal District Court granted summary judgment for defendants and dismissed the case. On appeal from that decision, the Court of Appeals affirmed the dismissal because the stigmatizing charges had not been disclosed while in the teacher's personnel file, and there was no longer a likelihood of future disclosure to prospective employers.[145]

More recently, in Hankins v. Dallas Independent School District,[146] a federal district court held that information in a teacher's file regarding his administrative release did not deprive him of his liberty interest in taking advantage of other employment opportunities. The Court noted that the record did not show that the information was ever released to prospective employers, and noted further that the plaintiff's argument was merely based on his speculation that the information would be released.

Unlike Brandt, in the Hankins case, along with the Court's finding of a lack of public disclosure, the Court found that the information itself was not stigmatizing. The information placed in the teacher's file merely consisted of an administrative code "made for the use of the Assistant Superintendent of Personnel to make decisions on the desirability of rehiring Plaintiff."[147] The Court found that placing this information in the teacher's file did not reach the level of stigmatization.[148] Therefore, although the Court in Hankins minimized the possible release of the information as being merely speculative, the decision does not directly conflict with the holding in Brandt because even if it had been released to a prospective employer, the teacher would not have been stigmatized.

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[145] 845 F.2d 416

[146] __F. Supp.__ (C.A. No. 3-85-1921-T) (N.D. Tex., August 31, 1988)

[147] Id., slip op. at 3

[148] Id., citing Campos v. Guillot, 743 F 2d 1123 (5th Cir. 1984)

What Process is Due?

This paper will not focus on the amount of due process required when a government employee is stigmatized during the course of being discharged from employment. The very fact that the stigmatizing statements or charges are accompanied by some kind of occupational or reputational loss creates an infringement of the employee's liberty interest and a demand for due process protection. The United States Supreme Court, in its landmark decision, Board of Regents v. Roth,[149] which began the current line of stigma cases, did not specify what type of procedures are required. Since Roth, case law has been unclear as to exactly what type of procedures must be utilized and courts tend to use a flexible approach. As a federal district court stated recently, "[a] wide variety of settings will permit a variety of process."[150] Basically, however, courts are in agreement that the degree of protection required necessarily includes notice of the charges and an opportunity to refute those charges, commonly referred to as a name clearing hearing. The purpose of the hearing is just that -- to give the stigmatized employee the chance to clear his name and to thus remove any occupational or reputational harm he may have suffered as a result of the false, stigmatizing statement.

It should be noted, however, that a name clearing hearing may not be required if the employee's name was already cleared in some other manner. In Hall v. Ford,[151] the United States Court of Appeals for the District of Columbia ruled that a hearing was not required even though a memorandum wrongfully implying malfeasance on the part of an athletic director was circulated around the time of his dismissal from employment. The Court held that, even assuming that the memorandum incorrectly suggested misconduct, a laudatory termination letter written by the president of the university "remove[d] any possibility that [the athletic director] was stigmatized by his dismissal."[152] The Court further stated that "[n]othing further would be gained from a name-clearing hearing."[153] The fact that the memorandum,

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149 408 US 564 (1972)

150 Fong v. Purdue University, 692 F.Supp. 930, 950 (N.D. Ind. 1988)

151 856 F.2d 255 (D.C. Cir. 1988)

152 Id. at 267

153 Id.

which only implied misconduct, was counteracted by the letter of termination, which expressly commented favorably on the athletic director's performance, resulted in the denial of a superfluous hearing. However, government employers cannot be certain that a letter such as that in Hall v. Ford will sufficiently counteract stigmatizing charges. The best policy would be to afford the employee a name clearing hearing when it is requested if there is any reason to believe that he has been stigmatized.

If a public employee has not been given proper notice of the charges or the opportunity to clear his name, his constitutional rights of due process may have been violated. Thus a school board must act with caution when advancing reasons for the dismissal of a teacher or other school district employee.

CONCLUSION

The foregoing cases are only a sample of the numerous cases which school districts across this nation face on the issues of defamation and stigma. School attorneys need to advise their client school districts of the need to understand the serious issues involved in this topic so that school administrators and school board members will understand the appropriate questions to ask their attorneys prior to taking action. Only in this way will school districts successfully act to prevent such lawsuits from being filed against themselves.

Picture this, you're a school attorney who represents a small school district. Since you have represented this district, there have not been any legal problems at all associated with the district. Let us imagine this tranquility is destroyed when you receive a telephone call from the president of the school board who informs you that she has just gotten off the telephone with the mother of a seventh grade student who is most upset. The board president tells you that she had been informed that the child had been in her seventh grade reading class and had asked her teacher just how long her teacher had been employed in the district and whether she had been a teacher long enough to have taught any of the student's parents. Let's further imagine you are told that this teacher responded to the inquisitive child's question by stating that she had indeed been a teacher long enough to have taught some of the children's parents and that she had in fact taught this particular child's mother a while back, but only for a short time because the child's mother was forced to leave school on account of her "pregnancy". As a school attorney, visions of defamation lawsuits begin dancing through your head.

These are the facts of a case from a New York State court entitled Murray v Watervliet City School District[154]. In this case, the New York State Appellate Division affirmed a lower state court's opinion holding that a triable issue was presented as to whether the making of such an allegedly slanderous statement was within the scope of the teacher's employment. If so, under the doctrine of respondeat superior, the school district could be held liable to the parent for defamatory statements made by its employees.

Another area of liability that has become increasingly more troublesome for public schools involves the deprivation of an employee's constitutionally protected liberty rights. Such deprivation occurs where a false stigmatizing statement accompanies the dismissal of a school district employee. As with defamation, stigmatizing remarks also involve statements made which adversely affect a person's reputation, but such statements additionally implicate the stigmatized person's liberty interests in his reputation or employment.

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154. 130 AD2d 830, 515 N.Y.S. 150 (N.Y. App. Div. 3d Dept. 1987)